To the Justices of the Supreme Judicial Court: March, 1989

Late in 1987 you appointed this Advisory Committee on Judicial Performance Evaluation to consider whether a program of judicial performance evaluation should be adopted in Massachusetts and to make its recommendations to you.

We favor the adoption of a program for the enhancement of judicial performance in Massachusetts, if it can be operated with absolute confidentiality. We make this recommendation for the improvement of judges' performance even though we believe that the overwhelming majority of Massachusetts judges perform their judicial duties under difficult and stressful conditions with competence and great integrity. Such a program will aid judges in improving their ability to do their work. Some, perhaps many, believe that the judiciary in Massachusetts could be more efficient and more responsive than it is. We think that the judiciary itself is better qualified to confront and eliminate this criticism than is some outside entity. The recent development of improved judicial education programs (and the prospect of even more activity in that area) is one kind of response to concerns about the quality of judicial performance. Another response could be a judicial performance enhancement program.

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reasons we shall explain, those evaluation programs do not provide a totally acceptable pattern for the Commonwealth. Because our proposed program is distinct in material aspects from evaluation programs in other jurisdictions, we suggest that the difference be recognized by abandoning the word "evaluation" and by referring to the Massachusetts program as a Judicial Performance Enhancement Program. Our goal is to help the development and growth of all judges with an enhancement program.

Although this committee does not favor formation of a performance enhancement program simply because it is "the thing to do," we believe it important that the judiciary not only appear to be, but in fact be, doing something about raising the consciousness of each judge concerning both the quality of his judicial efforts and the perception of his manner and conduct among those with whom he comes in contact. We believe that a well-structured, well-run program designed to assist judges in improving their levels of performance can contribute significantly to the quality of justice in this Commonwealth. Often the very existence of an ongoing judicial evaluation process will cause judges to be more conscientious and responsive. In some instances, the program will inform an individual judge of a weakness that needs to be corrected. In other instances, commentary on judicial performance may disclose a weakness in the system that will require a broader solution, such as specific educational programs or providing specialized

assistance to judges. We wish to emphasize that the purpose of any program is not to identify "deficient" judges (although that may occur) but to help all judges to achieve the fullest development of their judicial skills and attributes.

We do not prescribe the details of any judicial performance enhancement program because, in our view, the form of the program should be shaped in the next phase of the process. We do, however, describe in general terms the essential qualities of such a program. The objective of any worthwhile process for judicial development in Massachusetts must be to help judges improve their performance. The process must be non-threatening and non-confrontational. Judges must correctly perceive that the program involves neither the possibility of public disclosure of specific information nor the disciplinary aspects of a proceeding before the Judicial Conduct Commission. A proper judicial enhancement program in Massachusetts would thus involve no public disclosure of information about individual judges. Indeed, as we see it, such a program would not provide the means of making statistical comparisons among judges. Moreover, such a program must absolutely assure the anonymity of specific sources of information bearing on the performance of judges. Only by protecting sources from disclosure will the system encourage, deserve, and receive complete and candid comments. The Supreme Judicial Court must, therefore, by rule and otherwise assure the utmost level of protection against the release of confidential

information. If confidentiality cannot be assured, the program should not be implemented. If confidentiality is lost, the program should be abandoned.

In making our recommendations, we acknowledge that respected members of the judiciary will disagree with us. We think experienced senior judges can be helped by such a program, although it is probable that any program will be of the greatest benefit to newer members of the judiciary. There is no doubt that some judges will regard the program as unfairly intrusive. One judge wrote us: "To treat mature men and women as children who have to be monitored in their daily conduct is not only degrading, but it is an insult to many of our justices who have devoted many years of their lives to the public and who, in their private lives, live a very sequestered and narrow existence."

PROGRAMS ELSEWHERE

We gave careful attention to programs and procedures already developed elsewhere. We have considered what the American Bar Association (A.B.A.) has done and are aware of the continuing work of its Special Committee on Evaluation of Judicial Performance. Any program in this state must be developed and evaluated in light of the progress made in other jurisdictions. We concluded that the judicial performance evaluation programs in Connecticut and New Jersey were particularly worthy of our scrutiny. We devoted one entire meeting to each of these states.

1. The A.B.A. Guidelines. In 1985 the special A.B.A. committee published "Guidelines for the Evaluation of Judicial Performance." Those guidelines provide (1) a general outline of what criteria should be used in evaluating a judge's performance,[1] (2) methods by which an evaluation program could be developed, and (3) the uses to which the results and data from the program should be put. The primary object of any program, the A.B.A. committee says, is self-improvement. It recognizes that such a program might also aid in determining judicial assignments and in improving the content of continuing judicial education programs. The form and operation of any program must assure the continued independence of the judiciary. As will be seen, evaluation programs in some states are designed to disclose information publicly about particular judges. We categorically reject that approach. In Massachusetts, where judges are not elected and there is no judicial retention process (as there is in Connecticut and New Jersey), there is no need to publicize or disclose data concerning the performance of individual judges and the pressure to do so should be less intense than in almost any other jurisdiction in this country.

The A.B.A. guidelines propose that a state's highest court have the ultimate responsibility for the program and that the

[1] The A.B.A. criteria for evaluating a judge are (1) impartiality and integrity, (2) knowledge of the law, (3) communication skills, (4) preparation, attentiveness, and control over proceedings, (5) management skills, (6) punctuality, (7) service to the profession and the public, and (8) ability to work effectively with other judges.

program operate through a broadly-based committee. The results of and data developed by the program should be confidential. The individual judge and the judge responsible for that judge's performance should receive the individual results, but only general data should be made public. The A.B.A. guidelines oppose the issuance of rankings of judges and state that the evaluation process does not include judicial discipline. The guidelines state further that information should be given to judicial discipline agencies only where required by law or rules of professional conduct.

2. The Connecticut Program. On February 26, 1988, we met with two representatives of the evaluation program in Connecticut: Judge Aaron Ment, the chief court administrator, and Judge Maurice Sponzo, chairman of Connecticut's Judicial Evaluation Advisory Panel. Judge Sponzo described the Connecticut system, emphasizing the importance of preserving confidentiality and obtaining candid responses to questionnaires. Connecticut has one large unified trial court.

Questionnaires, distributed to attorneys who have completed proceedings of a specified length and nature, are returned to a central office and are immediately coded by number. The names of the attorneys and judges are removed, and the information in the questionnaires is available only to the Chief Justice, the Chief Court Administrator or his designees, and the subject judge. The

evaluation information is presented on computer printouts of the results of the questionnaires which permit a judge to compare responses concerning him to the average figures. The Chief Court Administrator has appointed two judges to meet with evaluated judges to discuss the results. He has used the information for assignment and training purposes. Subsequent evaluations have usually disclosed improved performance. Response rates to the questionnaires have been approximately 65% from attorneys and 70% from jurors. Jurors tend to submit very favorable responses which can be viewed as indicating public satisfaction with judges' performance. Although evaluation material was not originally intended to become part of Connecticut's judicial retention process, under a 1986 statute evaluation materials are now provided to the legislative judiciary committee. The information is to be used only for retention purposes and may not be disclosed by the committee. There has been no attempt in Connecticut to subpoena judicial evaluation information for use in court proceedings or otherwise.

Connecticut judges, largely opposed to the program at its inception, have become increasingly willing to accept the questionnaire results. Some judges, however, do not regard the program as worthwhile.

Connecticut has concluded that evaluation of trial judges by their supervising judges is not helpful. It does not have

appellate judges evaluate trial judges. Judges in the state's intermediate appellate court are evaluated but not those on the Supreme Court. Judge Ment believes appellate judges should not be evaluated, but others disagree.

The representatives from Connecticut believed that their evaluation program has improved judicial performance, produced better judicial education seminars, and served as a formalized method of keeping judges out of difficulty.

3. The New Jersey Program. On March 18, 1988, the committee met with Hon. Geoffrey Gaulkin of the Appellate Division of the New Jersey Superior Court and a member of the New Jersey Supreme Court's Committee on Judicial Performance, and Richard L. Saks, Esq., Project Director of the Judicial Evaluation Program in New Jersey. New Jersey, which has a unified statewide trial court, was perhaps the first state to develop a program that assesses judicial performance. It proceeded slowly in formulating its program, first conducting a pilot program. Shortly after we met with Judge Gaulkin and Mr. Saks, New Jersey completed the first phase of its permanent program, evaluating forty-eight trial judges based on information in questionnaires returned by lawyers who had appeared before those judges. The response rate from attorneys was very good (78%). The questions asked for an assessment of the judge on more than thirty performance standards as excellent, more than adequate, adequate, less than adequate, or poor.

New Jersey is reasonably pleased with its program. Most judges appear to favor it, although there is still some resistance from senior judges. Responses to questionnaires have helped to identify overburdened courts and specific areas where resources are inadequate. New Jersey also has a reappointment or retention system under which, after seven years on the bench, a judge must be reappointed. The evaluation program has been helpful in that process, although the program was not developed to serve that function.

Judge Gaulkin told us that, over-all, the attorney responses strongly approved the performance of the evaluated judges. In about every category, more than 90% of the responses rated the judges as adequate or better. Judge Gaulkin believes that written comments from attorneys are more helpful than the rankings given in answer to questions. We agree that subjective comments are far more likely to be helpful than compilations of numerical rankings given in answer to questions. In fact, we recommend that there be no numerical rating of judges, individually or for comparison purposes.

Each attorney is advised that the evaluated judge may see any comment he writes but that the questionnaires and the attorneys' names are kept confidential under court rule. Supervisory judges will meet with evaluated judges to assist them in improving their performance in light of the evaluation results. A judge may

request that a commission, consisting of three retired appellate judges, review the results and act as advisors concerning the judge's evaluation and performance. The New Jersey program cost about $100,000 in its first year of statewide operation.

Judge Gaulkin said that a juror questionnaire was not currently being used. Its use in the pilot program showed what he called a "halo" effect, a highly favorable assessment of judges. He thought the juror questionnaire might be refined and probably would be used again. On the other hand, he thought questionnaire responses from appellate judges were particularly helpful because they narrated criticisms of trial judges. If they were to do it all over again, Judge Gaulkin thought New Jersey would have conducted additional preliminary meetings with judges to inform them more fully of the status and timetable for the program. This is a point we in Massachusetts should keep in mind as we develop and implement our program.

4. General Comments on the Connecticut and New Jersey Programs. There are differences between Connecticut and New Jersey, on the one hand, and Massachusetts, on the other. The other two states have a process for the retention of judges which calls for a redetermination of appointments after an initial period of years. Neither state set up its evaluation program in order to aid in retention decisions, but in each state the evaluation process has come to serve as an aid in retention

decisions. Representatives of Connecticut and New Jersey thought the evaluation process usually provided favorable information by which a judge would be evaluated for retention purposes. None of this would be important to a judicial performance evaluation system in Massachusetts.

Connecticut and New Jersey have unified, statewide trial courts; Massachusetts does not. Because Massachusetts has seven separate divisions within its Trial Court, there may be good reason to distinguish among them in designing a judicial performance evaluation program. What needs to be done, for example, in a Land Court of four judges, all sitting in Boston, may reasonably differ in many respects from what needs to be done in evaluating more than 150 District Court judges who sit in courthouses all over the Commonwealth.

The Connecticut and New Jersey programs are heavily focused on responses to questionnaires sent to attorneys to provide information about the performance of individual judges. The use of questionnaires is an option that should be kept open in the development of a program in Massachusetts. As we have said, however, questionnaires that are designed to gather statistical data used for rating judges should not be used.

Neither Connecticut nor New Jersey differentiates between responses of experienced trial lawyers and those of relatively inexperienced trial lawyers. We think that separation of those groups' answers might be instructive to judges.

5. The November, 1988, ABA Conference. Two of our number, Judge Lewis and Mr. McLaughlin, attended an ABA National Conference on Judicial Performance Evaluation held in Chicago in early November, 1988. Their views on the manner in which programs are operated elsewhere are instructive. Their conclusions strengthened our resolve that any Massachusetts program (1) must preserve confidentiality to a far greater degree than is done elsewhere and (2) will prove its worth only if it significantly aids judges, individually and collectively, in improving their performance.

Our representatives' report may be summarized as follows:

(1) They concluded that programs elsewhere generally are not intended to improve judges. Programs elsewhere are used to provide information for voters (where judges are elected) and for officials involved in retention decisions (where judges are subject to retention determinations). Some persons involved in the administration of programs where judges are elected take pride in disseminating information that leads to the defeat of certain judges at the polls. Whatever the merits of such a process where judges are elected, public disclosure is not needed in Massachusetts for this or any other purpose.

(2) Our representatives heard nothing significant at the conference about the use of evaluation processes to educate and to improve the judiciary. Nor was there any significant

discussion in Chicago about self-evaluation by judges. It was made clear, however, that the operation of a proper evaluation program takes substantial amounts of judicial time and money. Our members also noted that programs elsewhere, in many instances, seem to be driven by a deep antagonism between the organized bar and the judiciary, a factor absent in Massachusetts. Programs developed in the Federal Courts, where no judges are elected or subject to retention decisions, may prove to be more instructive for Massachusetts (and we for them) than programs in other states. The operation of a program in the Court of Appeals for the Ninth Circuit, if it is funded, may be worth studying. The principal benefit would probably be obtained from self-evaluation by judges.

GENERAL DISCUSSION

In this section of our report we first set forth our views concerning the establishment of a program for judicial performance enhancement in Massachusetts, stating our conclusions that (1) such a program (initially at least) should be developed and operated separately in each trial court department, (2) the various departmental programs must be approved and supervised by a committee appointed by the Supreme Judicial Court and headed by the chief administrative justice, and (3) each chief justice must be involved in the process of developing a program. Before presenting our view as to how the program should be started up

and evaluated in its first years of operation (which we do in the section of this report entitled Specific Recommendations), we discuss various matters related to such a program. We consider the appropriate standards for measuring performance and discuss the possible role of questionnaires, particularly to trial lawyers, in the process. We then comment on the indispensability of confidentiality in any evaluation program and next emphasize the importance of the independence of any program from judicial discipline processes. Finally, we comment on the special circumstances relating to appellate judges and administrative judges.

1. The Development of a Program. From our discussions with representatives from Connecticut and New Jersey, our discussions with trial court chief justices, and our own deliberations, we have concluded that a program for judicial performance enhancement should be established in Massachusetts. We are persuaded that the program should be developed slowly and that each department of the trial court should be permitted to develop a proposal for its own program, which it would submit for approval to a supervisory committee appointed by the Supreme Judicial Court, headed by the chief administrative justice. Because it is important that there be coordination and oversight of any program established in any portion of the trial court, the office of the chief administrative justice must be responsible for the entire process, subject to the general superintendence of the Supreme Judicial Court.

It is an essential part of a successful program that judges not feel threatened by it. As we have said, the name of the program should not be burdened with the word "evaluation" but rather should have a title such as Judicial Performance Enhancement Program. In any event, to achieve its purpose, any program must not be threatening, or perceived as threatening, to judges.

Our meetings with several chief justices of trial court departments demonstrated that there are divergent views on how a program might be structured.[2] We want everyone involved to understand that judicial performance enhancement is not another name for a complaint process that responds to criticisms of judges from various sources. Any program must actively seek to gather information on judges relevant to judicial performance in order to help them directly in some instances and indirectly in others by recommending educational or instructional programs for all judges. We cannot picture a performance enhancement program from which a trial court chief justice would be wholly separated. The chief justice has to know what evaluation results are, judge by judge, and we doubt he can entirely delegate to other judges the tasks of discussing a judge's performance with him and finding solutions for individual or collective deficiencies that

[2] We met with the chief justices of the Superior, District, Probate, and Juvenile Courts. The chief justice of the Boston Municipal Court is a member of this committee.

the program discloses. On the other hand, once an individual problem is identified, one or more peers of the judge (or retired judges) might assist in implementing a solution to the problem.

2. The Standard for Evaluating Performance; Questionnaires. At first glance it might be thought easy to define what a good judge is and to identify the criteria for measuring how well a judge satisfies that definition. In fact, the subject is complicated. A good judge is not necessarily one who is constantly genial in the courtroom and highly popular with lawyers, litigants, and court personnel. In high volume courtrooms particularly, not every one may say all he wishes before the judge must act. In certain situations strong, critical words from the judge will be wholly appropriate. A judge who keeps tight control on the courtroom in order to expedite cases and to hold lawyers to high standards of performance may be an excellent judge, serving the administration of justice in the very best way. Judges who accede to lawyers' requests for continuances and relaxed procedures may be popular with lawyers but at the same time may be contributing needlessly to congestion in the courts. Thus the measure of a good judge may not be how lawyers, litigants, and others generally feel about him or how they think he behaves. For a truer assessment of his performance, a judge must be considered in light of more specific criteria, such as behavior the judge manifests. Audiotapes and videotapes of proceedings and attendance in court

can provide a means for assessing judicial performance. These processes can be expensive and time consuming, however, and may not provide all the information that is needed in certain circumstances. [3]

Knowledge of the impression that a judge makes over time on lawyers, litigants, lay advocates, witnesses, and court personnel may be needed in order to give the judge and others a solid basis for considering how his performance could be strengthened. It is for this reason that questionnaires have been developed and are being refined elsewhere, as are the methods for collecting, analyzing, and disseminating information. Although this committee does not urge the use of questionnaires in the performance enhancement process at this time, and some members of the committee are particularly skeptical of the use of questionnaires, experience may show that certain important information may be obtained only from answers to questionnaires, with questions properly framed and answers received in sufficient volume to give statistical credibility to the responses. We do not discount the possibility that some other process could be developed to gather the same information that questionnaires are

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[3] The committee received a suggestion for another program that would also be expensive and time consuming. A team of people (judges, clerks, probation officers, etc.) would visit individual courts to discuss problems and conditions with that court's personnel and then report their findings. Such a process probably exceeds the scope of judicial performance evaluation but could prove helpful in identifying common problems and solutions to them.

designed to produce. If questionnaires are to be used, we recommend that the process start slowly, that the first effort be a modest pilot program, and that judges be fully informed about the process, including the fact of the anonymity of the sources of information and the confidentiality of individual data collected. Any operation involving questionnaires will require substantial technical assistance and substantial funding. The formulation of appropriate questions, the process of collecting a credible volume of data, the preservation of confidentiality and anonymity, and the analysis and use of those data to aid judges, individually and collectively, require specialized skills. As we have said already, we do not favor gathering statistical data for making numerical ratings of judges and for making relative comparisons. We are not persuaded that any other state has refined its questionnaire to a point at which it is clear that all the right questions are being asked.

The committee is disinclined to support the use of questionnaires to appellate judges in which they would evaluate the performance of the trial judge in each case for which the appellate judge wrote the opinion of the court. The process would be too personal. We suspect that some form of juror participation in the process would be of value to the system.

Although there is the risk, as one trial chief justice opined, that a questionnaire or self-evaluation form sent to

judges asking them to evaluate their own performance might produce only self-laudatory answers, we are not certain that, at least in some trial court departments, some form of self-appraisal would be fruitless. Self-evaluation could be an important aspect of any evaluation program. A judge often will know areas in which he could improve his performance. Sometimes such an analysis will disclose particular acknowledged habits or practices which need to be changed. In other instances, self-evaluation will disclose deficiencies in the system which the judge believes have impaired his effectiveness. The problem may be in facilities, in equipment, or in support staff. The problem may be the need for education and guidance in some particular kind of case or problem. Once there has been self-identification of problems, the judicial system can seek remedies for them.

3. Confidentiality. An effective, worthwhile judicial performance enhancement program requires that sources of comment about individual judges be anonymous and that data compiled concerning an individual judge remain strictly confidential. Any evaluation program must be structured in order to achieve these purposes. Data concerning individuals should be destroyed when they have served the purpose of assisting individual judges to improve their performance.[4] Composite data might be retained

[4] The Supreme Judicial Court may wish to devise a means by which at least general conclusions about a trial judge, derived from the evaluation program, be available to it when it considers the appointment of the chief justice of a trial court department.

as a measure of system-wide performance. We are persuaded that the systems in Connecticut and New Jersey are well designed to preserve anonymity of sources, but they lack the confidentiality as to individual judges that we believe is essential.

The question arises whether anyone has a right to obtain data compiled concerning a judge over the objection of the judge and the program itself. We are aware of no situation in which a subpoena or other order seeking disclosure or production of evaluation data has been issued. We are confident that within the state judicial system a rule of the Supreme Judicial Court stating the confidentiality of information concerning sources of information and individual judges would be sufficient to protect those sources and judges. This subject is preeminently within the supervisory authority, constitutional and statutory, of the Supreme Judicial Court. See New Bedford Standard-Times Pub. Co. v. Clerk of the Third Dist. Ct. of Bristol, 377 Mass. 404, 410 (1979); Opinion of the Justices, 365 Mass. 639, 645-647 (1974). The likelihood that an intrusive order of a federal court would be issued and would withstand challenge seems small, absent an explicit authorizing act of Congress (and perhaps even then). See Equal Employment Opportunity Commn. v. Massachusetts, 858 F.2d 52 (1st Cir. 1988), affirming 680 F. Supp. 455 (D. Mass. 1988). See also Apkin v. Treasurer and Receiver Gen., 401 Mass. 427 (1988). It is difficult to imagine that anyone's constitutional right to access to information would rise to a

level that would require a breach of the absolute privilege against disclosure stated in a rule of the Supreme Judicial Court.

This matter of confidentiality will trouble some judges, in spite of what we have said in this report and what the Supreme Judicial Court may say by rule. The immediate destruction of all individualized information after it has been discussed with the judge may be necessary to assure confidence in the integrity of the system. Such a practice would have the downside effect, of course, of making comparisons over time more difficult to make.

Although information concerning an individual judge would be disclosed only to the judge, the judge's chief justice, and judges supervising the program, information about judges as a whole could be made available to the public. We recognize that situations may arise in which a judge may wish to disclose his own data. He should not be permitted to do so. Confidentiality must be absolute, and judges free from pressure to disclose results concerning themselves.

4. The Program's Independence from Judicial Discipline. In our view, the separation of judicial performance enhancement from judicial discipline processes is fundamental to the effective operation of an evaluation system. The Judicial Conduct Commission might properly send information to the performance enhancement program concerning matters not involving violations

of the Code of Judicial Conduct, such as comments on individual or collective judicial behavior that might appear to need attention. In turn, the performance enhancement program might discover conduct that is so blatantly improper that in good conscience it could not be ignored. In such a case, the program itself should not act on the information but rather it should advise the source of the information that the information could be brought to the attention of the Judicial Conduct Commission in some way. When we inquired of representatives of Connecticut and New Jersey what their programs would do if some clear violations of the Code of Judicial Conduct were brought to their attention, they said it had never happened, but that, in the unlikely event it did, they would refer the matter to the appropriate disciplinary authority. In the normal course, a judicial performance enhancement program would not develop information concerning violations of the Code of Judicial Conduct and, if such information were to come to the program's attention, it would probably be because the person providing the information erroneously sent the information to the program rather than to the Judicial Conduct Commission.

An effective performance enhancement program should head off many violations of the Code of Judicial Conduct. If the information concerning a given judge discloses that certain people who appear before that judge perceive him to be impatient, inattentive, discourteous, uninformed, or deficient in some other

respect, steps can be taken to correct the judge's conduct before it becomes a matter for judicial discipline proceedings. No judge wants to be known as impatient, inattentive, discourteous, or uninformed. Almost any judge who learns that certain reasonable people who deal with him sincerely believe that he has one of these inadequacies would want to correct the deficiency and would do so. An effective enhancement program would help that judge mend his ways and would monitor his performance to be certain that he did. The rare judge who will not admit that there is a problem or who does not care to correct an admitted problem will present a special challenge to his chief justice. The program should be of assistance in such a case because it will have documented the problem impartially.

Although it may be too early to present clear answers on the subject, attention must be given to how the judicial system expects to respond to the various individual and collective problems the program is likely to uncover.

5. Appellate and administrative judges. Logically, there is no reason to exclude appellate and administrative judges from a process that is designed to evaluate and improve judicial performance. Indeed, it might be impolitic for the Supreme Judicial Court to impose some form of evaluation process on trial judges and not on themselves and other appellate judges. The Connecticut program, however, does not evaluate appellate judges.

New Jersey contemplates having a program to evaluate the quality and timeliness of opinions and conduct on the appellate bench.

We have no specific proposal for the way in which relevant information on appellate judges might be gathered. Written opinions receive their own evaluation over time, and they are often the product of intense internal review by one's colleagues before they are released. The timeliness of the release of opinions is a matter of public record, and the Supreme Judicial Court and the Appeals Court have imposed on themselves an obligation to release an opinion in a case within 130 days of argument, if possible. This standard is met in well over 90% of the cases, and where it is not, the entire court (and everyone else involved) knows it. The delay is usually attributable to the difficulty of the issues or disagreement among the panel of justices participating in the case.

There remains, however, the question whether on-bench performance might be assessed. Each appellate court might undertake a confidential survey of attorneys arguing cases before panels of its court to determine whether there are aspects of the process or conduct by panels or individual judges that are regarded positively or negatively. In this Commonwealth, the unique practice of appellate court single justice sessions means that on-bench performance involves not only service on appellate panels but also appearances alone on the bench. When the trial

court develops techniques for the evaluation of trial judges sitting in situations comparable to appellate court single justice sessions, the Supreme Judicial Court and the Appeals Court should consider adopting those techniques in order to evaluate practices of their single justices.

Information on administrative justices should be obtained to the extent they sit and the program picks them up as it would any other sitting judge. The chief administrative justice should develop a means of appraising the performance of administrative justices. There is such close contact between the chief administrative justice and the various chief justices of the trial court that the views of the chief administrative justice concerning the performance of a chief justice should be known to that chief justice. The views of others on the same point could be sought.

SPECIFIC RECOMMENDATIONS

We recommend that the Supreme Judicial Court establish a two year program to permit alternative approaches to judicial performance enhancement in the trial court departments of the Commonwealth. Each department should propose a program for approval to a supervisory committee appointed by the Supreme Judicial Court of which the chief administrative justice would be chairman. Each program should meet the criteria that are set forth in these recommendations. The object of alternative

approaches is to permit an assessment whether certain programs are more beneficial than others and to determine whether there are differences among the trial court departments that justify differences in performance enhancement programs. During the two year period, each trial court chief justice, or his designee, should report periodically to the supervisory committee on the progress of his court's performance enhancement program, including recommendations for changes or improvements in the program. Toward the end of the two year period, the supervisory committee should report to the Supreme Judicial Court appraising the various alternative programs and setting forth recommendations for the future operation of a judicial performance enhancement program in Massachusetts. If such a program is continued, the Supreme Judicial Court will need a permanent advisory committee to assist it in its general superintendence of the program.

Any performance enhancement program must meet the following criteria:

(1) The process to be followed. The program must identify how the elements of the enhancement process will operate. Specifically, it should identify the primary source or sources of information about judges and should identify the frequency with which each judge in the department will be reviewed. Special attention to newly appointed judges should be considered. For

the experimental period, the process should involve enough judges so as to permit a meaningful evaluation of the process.

(2) The criteria for evaluation of performance. The proposed program should identify the criteria by which a judge's performance is to be measured. The American Bar Association committee has described criteria, and the questionnaires in Connecticut and New Jersey provide examples of appropriate criteria. Each proposal should justify the criteria selected.

We are generally aware of the work of the Supreme Judicial Court's committee on gender bias and anticipate that that committee will have recommendations concerning the identification of discrimination based on sex. We recommend that the criteria for evaluation include identification of indications of discrimination based on sex, race, color, creed, or national origin.

(3) Confidentiality. Each court's proposed program should explain in detail how particular sources of information will be kept anonymous and how information concerning each judge will be kept confidential. [In this respect, the Supreme Judicial Court must promulgate an appropriate rule of court prescribing anonymity.] The program should describe the procedures to be followed in the retention and destruction of information.

(4) Distribution of results. Each program should describe how the collected information is to be distributed. It is

assumed that the chief justice of the department and the individual judge will receive information concerning that judge. The program should describe what other person or persons are to have, or might have, access to individualized information. Summary reports based on a compilation of individual information should be made at least once a year to the supervisory committee, and to the Supreme Judicial Court. On occasion, it may be appropriate to make public information provided in those reports. Public disclosure of the process each department of the trial court adopted would be appropriate.

(5) Administrative structure. The proposal of each trial court department should describe the staffing and the administrative structure of its evaluation experiment. The cost of the program should be discussed.

In adopting an order concerning the adoption of judicial performance enhancement programs, the Supreme Judicial Court should provide sufficient time for each trial court department to submit its proposed program for approval, to permit the chief administrative justice and the supervisory committee to review it, and to obtain any necessary funding. Experience elsewhere indicates that the start-up process takes years, not months.

CONCLUSION

Based on what we have said above, we recommend that the Supreme Judicial Court, acting pursuant to its constitutional and

statutory powers of general superintendence, instruct the several chief justices of the trial court departments to prepare within a reasonable time a program for the enhancement of the performance of judges in their respective departments and to submit each program for approval to the supervisory committee appointed by the Supreme Judicial Court. The operation of the various programs will be monitored by the chief administrative justice and the supervisory committee, and the committee should report to the Supreme Judicial Court its conclusions about the various programs, all as more fully described in the body of this report.

Respectfully submitted,

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District Court Dept.

The views of those who do not join in the Committee's recommendations are contained in the attached letters. Those members are:

Hon. Edward W. Farrell
Probate and Family Court

Hon. John E. Fenton
Land Court

Hon. Charlotte A. Perretta
Appeals Court

Hon. William J. Tierney
Boston Municipal Court

COMMONWEALTH OF MASSACHUSETTS
THE APPEALS COURT
BOSTON 02108

CHARLOTTE ANNE PERRETTA
ASSOCIATE JUSTICE

February 9, 1989

Honorable Herbert P. Wilkins
Supreme Judicial Court
1300 New Courthouse Building
Boston, Massachusetts 02108

Re: The Advisory Committee on Judicial Performance Evaluation

Dear Justice Wilkins,

Consistent with my position during our committee meetings, I express my views on the final report as a committee member. I do not and cannot speak on behalf of the Appeals Court.

Based upon the Court's letter of September 22, 1987, to the justices of the Massachusetts courts announcing the formation of the Committee, it has been my understanding from the outset that the Committee was established for the following purposes: (1) to determine the advisability of establishing a judicial performance evaluation program which would improve individual judicial performance and public confidence in the judiciary; and (2) to determine the best manner and means for implementing such a program if it were concluded to be advisable. As indicated in the Committee's final report, the Committee recommends that programs for the evaluation of the performance of judges be prepared and submitted to a supervisory committee to be appointed by the Supreme Judicial Court. Respectfully, I do not join in the Committee's recommendation for the following reasons.

As the minutes of our meetings and the final report indicate, the Committee placed immediate and much focus on the concept of individual judicial evaluation by means of questionnaires. This focus was perhaps due to the letter of September 22, 1987, which prompted some, but not many, judges to write their views to the Committee. In any event, the Committee heard from persons from other jurisdictions where questionnaires are in use, and we studied the form of the questionnaires and the information which they produced. It is explained in the final report that the Committee found that those programs were not intended to improve judicial performance. What was most interesting about the evaluation results was the fact that the information compiled on the individual judges was, by and large, very favorable and positive. Put in terms of public confidence or accountability, the programs were used to provide information

to those persons to whom the evaluated judges were answerable, voters and various forms of retention committees.

It is noted in the final report that the Committee does not urge the use of questionnaires and that we do not discount the possibility that some other process could be developed to gather the same information that questionnaires are designed to produce. Whatever the process, however, it appears to be predicated upon the gathering and compilation of written data which, in turn, is then to be used for the sole purpose of assisting the judge to improve his or her performance.

No reasonable person can be against the enhancement of judicial performance. Every dedicated member of the judiciary shares that goal with the Committee. Yet the experiences of those jurisdictions utilizing written evaluations demonstrates that the compiled data does not provide a judge seeking to improve his or her performance with meaningful and reliable information. On the other hand, as indicated by persons appearing before the Committee as well as by some Committee members, in those instances where a judge's dedication or performance is so lacking or unacceptable as to warrant comment or official action, that particular judge is most likely already known to his or her Chief Justice and colleagues as well as to many members of the Bar.

Of major concern is the emphasis in the final report on the confidentiality and non-disclosure of the evaluation data. In my view, any evaluation program predicated upon confidentiality (even assuming that confidentiality could be maintained) will not improve public confidence in the judiciary. To the contrary, it will create or confirm a public perception that the judiciary cloaks itself (institutionally) and its members from scrutiny and censure. Moreover, I do not think that disclosure of the results in a collective manner removes this critical concern.

I do not suggest that I favor disclosure or that I necessarily disfavor evaluations. Rather, it is my view that mandatory individual evaluations, disclosed or protected, do not address the real issue as it relates to public confidence in the judiciary: what, if anything, can be done when a judge evaluated or already known as needing to improve in important but non-ethical aspects of his or her performance either cannot or will not attend to the matter.

It is my view that it is the primary responsibility of the Chief Justice of the several trial court departments and the Chief Administrative Justice to require their associates to provide the public with the judicial performance to which it is rightfully entitled and to assist those associates having difficulty in doing so. It is the Chief Justice of the several trial court departments and the Chief Administrative Justice who best know the strengths and weaknesses of their associates as well as the problems particular to their departments as they

might pertain to individual performance. If they lack the authority or the resources to carry out this primary obligation, I submit that is a problem which should be addressed.

In the interim, I would report to the Justices that a program such as that outlined and described on September 22, 1987, is not advisable as it cannot meet the dual objective therein described.

Respectfully,

CHARLOTTE ANNE PERRETTA

CAP/bas

Telephones 362-2511, Probate Ext. 594;
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COMMONWEALTH OF MASSACHUSETTS
THE TRIAL COURT
PROBATE AND FAMILY COURT DEPARTMENT
BARNSTABLE DIVISION
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FREDERIC P. CLAUSSEN
REGISTER
EXTENSION 265

ROBERT D. FARRELL
FIRST ASSISTANT REGISTER
EXTENSION 263

SHIRLEY R. LEWIS
FIRST JUSTICE
JOHN V. HARVEY
ASSOCIATE JUSTICE

MILDRED A. BENJAMIN
SECOND ASSISTANT REGISTER
EXTENSION 256

WILLIAM L. BRADLEY
FAMILY SERVICE OFFICER
EXTENSION 262

February 17, 1989

Hon. Herbert P. Wilkins
Supreme Judicial Court
1300 New Courthouse
Boston, MA 02108

Re: The Advisory Committee on Judicial Performance Evaluation

Dear Justice Wilkins:

I would like to join in Associate Justice Perretta's letter to you. I do not believe that an evaluation program should be implemented.

However, if this view does not prevail, then I am satisfied that your last draft report of the Committee does set acceptable criteria for such a program.

Truly yours,

Edward W. Farrell
Associate Justice
Probate & Family Court Dept.

EWF:NP

BOSTON MUNICIPAL COURT DEPARTMENT
OF THE TRIAL COURT
COMMONWEALTH OF MASSACHUSETTS
COURT HOUSE, BOSTON 02108

February 21, 1989

Hon. Herbert P. Wilkins
Supreme Judicial Court
1300 New Court House
Boston, Massachusetts 02108

Dear Justice Wilkins:

The advisory committee on Judicial Performance Evaluation appointed by the Supreme Judicial Court by memorandum dated September 22, 1987, was charged to report its conclusions as to the advisability of establishing a judicial performance evaluation program and if such a program is to be established the best manner and means for implementing it.

The primary purpose of such a program would be self improvement of each judge and thereby the further development and enhancement, and public confidence in the judiciary. The following criteria would be appropriate for the evaluation of judicial performance:

(1) Integrity
(2) Understanding of the Law
(3) Communication Skills
(4) Control Over the Proceeding
(5) Skills as a Manager
(6) Punctuality
(7) Instilling Public Confidence in the Judicial System
(8) Ability to Work with Others

Self improvement, in my opinion, would best be achieved by continuing judicial education programs sponsored by the Flaschner Judicial Institute in conjunction with mandatory programs offered by the Judicial Training Institute which is nearly on line.

I do not believe that it is necessary for a rule of court to be adopted and promulgated by the Supreme Judicial Court in order to enhance judicial performance. The statutory authority of the Chief Administrative Justice under c. 211B of the General Laws together with the inherent power of the Supreme Judicial Court as delegated to the Chief Administrative Justice and the several administrative justices of the trial court would enable each department of the trial court to establish pilot programs structured as to the nature of its business and subject to the approval of the Chief Administrative Justice.

A hypothetical committee, for instance, would include three senior or experienced judges, three trial attorneys practicing in that department from the various bar associations and perhaps a committee member appointed by the Chief Administrative Justice, and their work would not be recorded or preserved.

I believe that the decided majority of the justices of the trial court perform their judicial duties and functions under difficult circumstances and stressful conditions in an exemplary manner with great integrity. I further believe that judicial performance will be improved and enhanced by departmental programs approved by the Chief Administrative Justice, education, self evaluation, encouragement and the support of one's administrative justice and colleagues.

Like many members of the committee representing both the bench and the bar I am sincerely disturbed about the confidentiality, disclosure, non-disclosure aspect of some programs. I have had the opportunity to read and reflect upon this aspect in comments written by members serving on the committee and their arguments on this subject are persuasive.

I would then respectfully report to the Supreme Judicial Court that a limited intradepartmental pilot program submitted by each Administrative Justice to the Chief Administrative Justice for his approval be implemented when approved, not subject to court rule, and that a demonstrated needs test be applied to any further expansion of such an enhancement program, subject to a study by the Judicial Council of this Commonwealth which was established "for the continuous study of the organization, rules and methods of procedure and practice of the judicial system of the Commonwealth, the work accomplished, and the results produced by that system and its various parts." G. L. c. 221, sec. 34A.

Respectfully submitted,

William J. Tierney

William J. Tierney
ADMINISTRATIVE JUSTICE

The Commonwealth of Massachusetts
Land Court
Department of the Trial Court
Court House, Boston 02108

John E. Fenton, Jr.
Justice

February 21, 1989

With respect for the views of the majority, I do not join in the specific recommendations of the Advisory Committee on Judicial Performance Evaluation for the following reasons:

The recommendations propose a system-wide structured two year experimental program with substantive and process flexibility in each trial court department, monitored by a supervisory committee appointed by the Supreme Judicial Court. The sole objective of the program is to enhance judicial performance by alternative methodologies which are to be proposed by each trial court department and approved by the supervisory committee. The entire program is predicated on principles of absolute confidentiality. The report, in fact, proposes that if confidentiality is ever lost the entire program should be abandoned.

I do not share the confidence of the majority that the program (or programs) proposed will achieve the laudable objective of improved judicial performance founded on a structure of total confidentiality.

The committee has evaluated in detail existing programs in Connecticut and New Jersey. I have not been persuaded that judicial performance has demonstrably improved in either jurisdiction as a result of the programs in

place. It is also evident that neither jurisdiction has been able to maintain absolute confidentiality of the results of information gathering surveys about the performance of judges. Programs in these and other jurisdictions appear to me to be a response to allay the concerns of the electorate or judicial retention bodies.

From my vantage point of more than a decade of meeting and participating in the education of judges from all states as a faculty member of the National Judicial College, I have the conviction that this Commonweath is blessed with a complement of hardworking, highly competent judges who perform their duties often with limited resources and with great integrity. In my view, judicial performance, already at a high level, is consistently improving. Merit selection, legislative reform of Judicial Conduct Commission procedures and, a variety of quality programs offered by the Flaschner Institute have contributed to the improvement. While each department is trying to improve its own level of performance, there will soon be in place and available to all judges the offerings of the newly established Judicial Training Institute.

I am certain that all responsible judges would support any program designed to insure with reasonable predictability the improvement of their judicial performance. While I do not favor the structured program recommended by the majority, I do support the establishment of internal programs in each department of the trial court with emphasis on self-evaluation, encouragement and support of judicial colleagues and the oversight and direct participation of the Chief Justices. In my judgment the strengths and weaknesses of most judges under their jurisdiction are

fairly well known to the Chief Justices of the Trial Court Departments. It is at this level of the conference of Chief Justices working with the Chief Administrative Justice that departmental performance improvement programs and policies should be discussed, evaluated and implemented if warranted. Structured programs based on survey and questionaire responses, collection, evaluation and storage of statistical information are time consuming, very costly and, in my view, without demonstrated performance enhancement results.

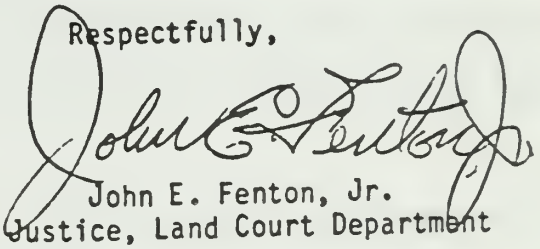
I am most troubled by the confidentiality aspects of highly structured programs. If the Supreme Judicial Court, by rule, protects the confidentiality of information essential to the existence of the program, I predict that there will be inordinate and sustained media and activist citizen demand for evaluation information on individual judges. There will be inevitable leaks to the media and rumors about the evaluation of certain judges will begin to appear in gossip columns and on talk programs. When there is institutional resistance to the release of the confidential information, media complaints of judge protection will surely follow. The objective of improving public confidence in the judiciary will be diminished.

I suggest that the administration of justice and its public perception depends not solely upon judges performing their duties with dignity, competence, and integrity, but also upon adequate support personnel being made available to them together with appropriate resource allocation. To single out judges for structured individual evaluation without a concomitant program of systemic performance evaluation is questionable.

At the All Court Conference on Judicial Accountability in 1987, Attorney Edward B. Hanify reminded us that there is an ancient maxim of philosophy known as Occam's Razor: "Entities are not to be multiplied without necessity."

I would respectfully report to the Justices that there is no necessity for a structured performance enhancement program as proposed by the majority since, as proposed, it will not, in my view, enhance judicial performance and public confidence in the judiciary, the dual objectives addressed in the Supreme Judicial Court's letter of September 22, 1987.

Respectfully,



John E. Fenton, Jr.
Justice, Land Court Department

CONTACT: Joan Kenney
Supreme Judicial Court
617/725-8524

FOR IMMEDIATE RELEASE
April 19, 1989

PRESS RELEASE

Boston, MA (April 19, 1989) -- The Supreme Judicial Court has recently established by court order a two year program to study alternative approaches to judicial performance enhancement in the departments of the trial court. In establishing the program the Court adopted the recommendations of the Advisory Committee on Judicial Performance Evaluation contained in the attached report.

Under the program, each trial court Chief Justice will submit a program of judicial performance enhancement for approval to a supervisory committee to be appointed by the Court and chaired by the Chief Administrative Justice. The programs must meet certain criteria concerning the process to be followed, the criteria for evaluation of performance, confidentiality, distribution of results and administrative structure, all as set forth in the Report of the Advisory Committee on Judicial Performance Evaluation. Toward the end of the two year period, the supervisory committee will issue a report to the Court which appraises the various alternative programs and contains recommendations for the future operation of a judicial performance enhancement program in Massachusetts.

A copy of the order from the Supreme Judicial Court is attached.

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COMMONWEALTH OF MASSACHUSETTS

Supreme Judicial Court Suffolk, ss.

ORDER

The Chief Justice and Justices of the Supreme Judicial Court hereby establish a two year judicial performance enhancement program. The program shall be implemented in accordance with the recommendations contained in the attached Report of the Advisory Committee on Judicial Performance Evaluation which are hereby adopted by the Court.

April 10, 1989

EDWARD F. HENNESSEY, Chief Justice

HERBERT P. WILKINS)

PAUL J. LIACOS)

RUTH I. ABRAMS) Justices

JOSEPH R. NOLAN)

NEIL L. LYNCH)

FRANCIS P. O'CONNOR)